

FILE COPY

MAY 23 1947

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

—
No. 1404
—

RALPH P. COUNSELMAN,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS
ADMINISTRATOR

—
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF AP-
PEALS AND BRIEF IN SUPPORT THEREOF.

—
MICHAEL F. KEOGH,
J. ROBERT CAREY,
RICHARD H. LOVE,
Counsel for Petitioner.

INDEX

SUBJECT INDEX

| | Page |
|---|------|
| Petition for writ of certiorari | 1 |
| Opinions below | 1 |
| Statement of the matter involved | 2 |
| Jurisdictional statement | 3 |
| Questions presented | 4 |
| Reasons relied on for allowance of writ | 5 |
| Prayer for writ | 6 |
| Brief in support of petition | 7 |
| Jurisdiction | 7 |
| Specification of error to be urged | 8 |
| Summary of argument | 8 |
| Argument | 9 |
| Conclusion | 15 |

TABLE OF CASES CITED

| | |
|--|-------|
| <i>Bridwell v. Aderhold</i> , 13 Fed. Supp. 253 | 11 |
| <i>Dupuis v. United States</i> , 5 F. (2d) 231 | 11 |
| <i>Holden v. Hardy</i> , 169 U. S. 366, 42 L. Ed. 789, 18 Sup. Ct. 383 | 12 |
| <i>Hurwitz v. North</i> , 271 U. S. 40 | 9 |
| <i>Johnson v. Zerbst</i> , 304 U. S. 458 | 11 |
| <i>Yakus v. United States</i> , 321 U. S. 414, 64 Sup. Ct. 660 | 5, 13 |
| <i>United States v. Aaron Burr</i> , Fed. Cas. No. 14692d | 11 |

OTHER AUTHORITIES CITED

| | |
|---|------|
| Act of January 30, 1942, Chap. 26, Title II, Sec. 204(d), 56 Stat. 23 as amended (50 App. U. S. C. A. 924(d)) | 3, 7 |
| 70 Corpus Juris, p. 35 | 11 |

6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS
ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF AP-
PEALS.

*To the Honorable, the Chief Justice, and the Associate
Justices of the Supreme Court of the United States:*

Ralph P. Counselman, by his attorneys, prays that a Writ of Certiorari issue to the United States Emergency Court of Appeals to review a final judgment of that Court entered in the above entitled cause on April 23, 1947 (R. 234).

Opinion Below

The only opinion of the Courts below was that of the Emergency Court of Appeals (R. 229), 159 Fed. 2d —.

Statement of the Matter Involved

On April 5, 1943, complainant was indicted in the District Court of the United States for the District of Columbia for violations of Revised Maximum Price Regulation 169, issued by the Price Administrator pursuant to the Emergency Price Control Act. Petitioner filed a demurrer and a motion to quash to said indictment and after the same were overruled, entered a plea of guilty to said indictment, and on March 1, 1946, was sentenced to pay a fine of \$4,300.

Thereafter on March 4, 1946, petitioner filed in the District Court of the United States for the District of Columbia an application for leave to file a complaint in the Emergency Court of Appeals, and upon leave being granted, filed his complaint in the Emergency Court of Appeals under Section 203(e) of the Emergency Price Control Act of 1942 as amended. After answer was filed by the respondent, petitioner then filed, in accordance with Rule 18(a) of the rules of the United States Emergency Court of Appeals, an application for leave to introduce evidence. By order of the Court on May 27, 1946, petitioner was authorized to introduce the evidence described in his application with but few exceptions. On July 11, 1946, petitioner filed a motion to produce (R. 197) and asked the Court for an order requiring the respondent to make available to the complainant certain information in the possession and control of the respondent. On July 20, 1946, the Court amended its order of May 27th authorizing the introduction of evidence and on July 24, 1946, the Court denied the motion to produce (R. 210-211).

Evidence was then introduced to the Administrator, pursuant to the amended order of July 20, 1946, and on November 6, 1946, the respondent filed a transcript of proceedings before the Price Administrator. On November 19, 1946, petitioner filed a motion for leave to subpoena and examine

witnesses (R. 214), setting forth the names of various employees and officials of the Office of Price Administration, some of whom having testified before Congress that the regulation in question was illegal. The motion for leave to subpoena and examine witnesses was denied by the Court without oral argument on December 5, 1946 (R. 219). On December 13, 1946, petitioner filed a motion for reconsideration or alternative relief (R. 220) asking the Court to reconsider its denial to the petitioner of the right to subpoena, or in the alternative to set forth findings and conclusions of fact and law upon which the Court's order was based. In this motion petitioner pointed out that the record might be found by the Court to be insufficient to justify a finding that the regulation in question was invalid. On December 20, 1946, without oral argument the Court again denied petitioner's motion without opinion (R. 225). Thereupon briefs were submitted on behalf of petitioner and respondent, the case was argued, and the Court handed down its opinion on April 23, 1947, and among other reasons for dismissing the complaint, stated: "Complainant has failed to sustain the burden of proof resting upon him in this matter" (R. 231).

Jurisdictional Statement

The jurisdiction of this Court is invoked under Act of Congress, January 30, 1942, Chap. 26, Title II, Sec. 204(d) 56 Stat. 23 as amended (50 App. U. S. C. A. 924(d)), which provides:

"Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a Writ of Certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a Circuit Court of Appeals, as provided

in Section 240 of the Judicial Code as amended (USC 1934 Ed., Title 28, Sec. 347)."

Whether or not Congress can devise a procedure for the trial of a criminal case which results in a denial to a defendant of the right to have compulsory process in his favor, is a question of general importance which should be decided by this Court. In the instant case the United States Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is a question of substance, therefore, whether when there is a splitting of the criminal trial for violations of an administrative regulation, the specially created emergency court can preclude the defendant from establishing the invalidity of the regulation by depriving him of the right of subpoena.

Questions Presented

1. Can Congress devise a procedure in a criminal case which results in a denial to the defendant of the right to have compulsory process in his favor?
2. Did the action of the Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprive the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution?
3. Did the Emergency Court of Appeals err in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses?
4. Did Congress intend, by taking away from the District Court the power to pass upon the validity of an administrative regulation issued under the Emergency Price

Control Act, to take away a defendant's right to issue subpoenas in connection with the issue of validity?

5. Where there is a splitting of the criminal trial for violations of an administrative regulation, can the court specially created to determine the issue of validity preclude the defendant from establishing the invalidity of the regulation by depriving him of the right of subpoena?

6. Did the United States Emergency Court of Appeals err in dismissing the complaint filed herein on the ground that complainant failed to sustain the burden of proof, when it had denied complainant's motion to produce and motion for leave to subpoena and examine witnesses?

Reasons Relied On for Allowance of Writ

In view of the earlier decisions of this Court upholding the constitutionality of the Emergency Price Control Act, the issues raised in this case involve an important question of federal law which has not been but should be settled by this Court. In the case of *Yakus v. U. S.*, 64 S. Ct. 660; 321 U. S. 414, 446, this Court held:

"As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny to those charged with violations an adequate opportunity to be heard on the question of validity."

The Court further stated:

"Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision as they

may be whether they arise in the Emergency Court of Appeals or in the District Court upon a criminal trial."

In the present case it is respectfully submitted that by depriving the petitioner of the right of subpoena, the Emergency Court of Appeals precluded the petitioner from establishing the invalidity of the regulation in question.

Equally important is the fact that in acting as it did the Emergency Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays, that this Court may issue a Writ of Certiorari to the United States Emergency Court of Appeals directing it to certify and send to this Court a full and complete transcript of the record therein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriate.

MICHAEL F. KEOGH,

J. ROBERT CAREY,

RICHARD H. LOVE,

Attorneys for Petitioner,

Woodward Building,

Washington 5, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1404

RALPH P. COUNSELMAN,

Petitioner,

vs.

PHILIP B. FLEMING, TEMPORARY CONTROLS
ADMINISTRATOR

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

The opinion of the United States Emergency Court of Appeals in the above entitled cause will be found in 159 F. (2d) — (R. 266).

Jurisdiction

The petitioner claims that he is entitled to have the opinion and judgment of the United States Emergency Court of Appeals reviewed by virtue of Section 204(d) of the Emergency Price Control Act as amended, for the following reasons:

1. The United States Emergency Court of Appeals has dismissed the complaint filed therein by petitioner on the ground that the petitioner failed to sustain the burden of

proof resting upon him, but said Court departed from the accepted and usual course of judicial proceedings when it denied petitioner's motion to produce and motion for leave to subpoena and examine witnesses.

2. The Emergency Court of Appeals denied to the petitioner the due process of law guaranteed to him by the Fifth and Sixth Amendments, depriving him of the right to have compulsory process for the attendance of witnesses in his favor.

3. It is a question of substance and general importance as to whether a defendant who is charged with violating an administrative regulation and who has resorted to the statutory procedure, can be precluded from establishing its invalidity.

Specifications of Error to Be Urged

1. The Emergency Court of Appeals erred in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses.

2. The United States Emergency Court of Appeals erred in dismissing petitioner's complaint on the ground that he had failed to sustain the burden of proof when it had denied his motion to produce and his motion for leave to subpoena and examine witnesses.

3. The United States Emergency Court of Appeals denied to the petitioner the due process of law guaranteed him by the Fifth and Sixth Amendments by depriving him of the right to have compulsory process for the attendance of witnesses, thereby precluding him from establishing the invalidity of the regulation.

Summary of Argument

1. If certain issues in the trial of a criminal case must be determined in a special tribunal, the entire case and the

trial of the special issues do not lose their identity as a criminal procedure.

2. A Defendant in all criminal prosecutions has the right to have compulsory process for obtaining witnesses in his favor.

3. The Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprived the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendments to the Constitution.

Argument

1

If certain issues in the trial of a criminal case must be determined in a special tribunal, the entire case and the trial of the special issues do not lose their identity as a criminal procedure.

It has been held many times by the Supreme Court of the United States that the due process clause does not require any particular form or method of procedure but that its requirements are satisfied if the person affected by the proceeding has reasonable notice and reasonable opportunity to be heard and to present evidence, due regard being had to the nature of the proceedings and the character of the rights which may be affected. *Hurwitz v. North*, 271 U. S. 40.

The instant case had its origin in a criminal proceeding in the District Court of the United States for the District of Columbia, where the petitioner was indicted for violation of a regulation promulgated under the Emergency Price Control Act. Because of the Provisions of the Emergency Price Control Act the proceedings were divided so that the District Court could not pass upon the validity of

the regulation in question which had been placed in issue by the petitioner as his defense. This petitioner, unlike those in the *Yakus* case, did follow the procedure outlined by the Emergency Price Control Act and after having taken the necessary procedural steps did raise in the Emergency Court of Appeals the question of the validity of the regulation in question. However separated from the original criminal trial this determination of the validity of the regulation might be and whatever may be the form of the procedure before the Emergency Court of Appeals, nevertheless, the determination before that court must be considered to be part and parcel of the initial criminal proceeding. In the ordinary case where a person is accused of the violation of a regulation or law, he may defend himself in the trial court by a showing that the regulation or statute which he is charged of violating is itself in violation of the fundamental law of the United States and if the establishment of that defense requires factual support, he has the right guaranteed by the Sixth Amendment to the Constitution of the United States to have compulsory process for obtaining witnesses in his favor. If the issues relating to one item of defense to be raised in a criminal case by statute must be tried before a special tribunal, then the defendant must have equal facilities to be heard and present evidence as he would have had before the regular trial tribunal. That equal facility to be heard and present evidence would certainly include the right to have subpoenas issued in his behalf for the compulsory attendance of witnesses possessed with the facts necessary to prove the defense. Short of this right the defendant is not afforded judicial remedies adequate to the protection of his rights, and equivalent to those guaranteed to him by the Constitution.

A defendant in all criminal prosecutions has the right to have compulsory process for obtaining witnesses in his favor.

In 70 *Corpus Juris* at p. 35, we find:

"At common law a person accused of crime could not as a matter of right demand compulsory process for his witnesses, but under Constitutional and statutory provisions a person accused of crime has the right to have compulsory process for obtaining the attendance of witnesses in his behalf. The right, when guaranteed by the Constitutional provision, is a real, substantive and absolute one which may be exercised or waived by the accused, but of which he may not be deprived by the court, jury or legislatures."

This right of a defendant in a criminal case to have compulsory attendance of witnesses in his favor is such a fundamental right and so seldom has it been denied, that few decisions are found relating to it. In the case of *Dupuis v. U. S.*, 5 Fed. 2d 231, it was held that when the defendant's witnesses are to be prosecuted at the expense of the Government, that it was a matter of discretion for the trial judge. In the case of *U. S. v. Aaron Burr*, Fed. Cas. No. 14692d, it was held that any person charged with a crime in the courts of the United States has a right before, as well as after, indictment to the process of the court to compel the attendance of his witnesses. In the case of *Bridwell v. Aderhold*, 13 Fed. Supp. 253, the district judge in ruling that the accused had waived his right to counsel, which ruling was reversed by this Court in the case of *Johnson v. Zerbst*, 304 U. S. 458, stated:

"The (Sixth) Amendment guarantees this right to the accused in all criminal prosecutions. There is no

limitation of these rights to cases where the accused is charged with a capital offense as urged by respondent and no reason appears in logic, morals or humanity why an accused in danger of deprivation of his life or liberty, should in any criminal prosecution be deprived of these rights by implication. These are fundamental rights which the courts should safeguard with meticulous care and award to the accused whether requested or not, unless waived by him in a manner showing his express and intelligent consent."

In the case of *Holden v. Hardy*, 169 U. S. 366, 386, 42 L. Ed. 789, 18 S. Ct. 383, the Court in discussing the difficulty in defining with exactness the phrase "due process of law", stated:

"The earlier practice of the common law which denied the benefit of witnesses to a person accused of felony had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

Regardless of the foregoing authorities, it is significant that Rule 29 of the United States Emergency Court of Appeals, which rule is entitled "Table of Fees", provides for a fee to be paid for the issuance of a subpoena or other writ or process. It is submitted, therefore, that the procedure devised by Congress in the Emergency Price Control Act did not deny to the petitioner the right to have compulsory process in his favor exercised in the United States Emergency Court of Appeals.

The Emergency Court of Appeals in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses deprived the petitioner of the due process of law guaranteed by the Fifth and Sixth Amendments to the Constitution.

The question of invalidity of the regulation promulgated by the Office of Price Administration involves a determination of whether or not the Administrator's action was arbitrary and capricious and whether the regulation failed to conform to the statutory standards required by the Act. All this requires in the way of proof extrinsic economic data. In the instant case the petitioner, by the denial of his motion to produce and subsequently by the denial of his motion for leave to subpoena and examine witnesses, was denied access to the very source of evidence required to establish the invalidity.

In discussing the procedural features of the Emergency Price Control Act, this Court in *Yakus v. U. S.*, 321 U. S. 414, 444, the Court said:

“There is no Constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process as is the case here.”

Again, Page 446, the Court said:

“As we have pointed out, such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity.”

Again on Page 447 the Court said:

"Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds."

On Page 433 the Court said:

"As with the present statute it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. *Bradley v. Richmond*, 227 U. S. 477; *First National Bank v. Weld County*, 264 U. S. 450; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337."

In the present case the petitioner endeavored to obtain evidence by a motion to produce. Later he endeavored to secure evidence and asked for the right of subpoena. When both of these means were denied him, can it be said that he was afforded "a reasonable opportunity to be heard and present evidence"? It is urged that the procedure in the instant case in the United States Emergency Court of Appeals falls short of the due process requirements as outlined in the case of *Yakus v. U. S.* It is respectfully submitted, therefore, that in denying petitioner's motion to produce and motion for leave to subpoena and examine witnesses, the Emergency Court of Appeals deprived the

petitioner of the due process of law guaranteed to him by the Fifth and Sixth Amendments to the United States Constitution.

Conclusion

In conclusion, it is respectfully submitted that this Court should grant a Writ of Certiorari to the end that the aforementioned judgment entered in this cause against your petitioner, in the United States Emergency Court of Appeals, may be reviewed and reversed by this Court.

Respectfully submitted,

MICHAEL F. KEOGH,
J. ROBERT CAREY,
RICHARD H. LOVE,
Attorneys for Petitioner,
Woodward Building,
Washington, D. C.